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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1969

CHARLES EDMUNDSON and ROY HAMILTON,
Petitioners,

vs.

THE STATE OF TENNESSEE, ex rel., JUDGE W. PRESTON BATTLE,
Respondent.

No. [redacted] 56

REPLY TO PETITION FOR WRIT OF CERTIORARI.

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No. .....

REPLY TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners, Charles Edmundson, a reporter for the Commercial Appeal, a Memphis, Tennessee newspaper and Roy Hamilton, a reporter for the Memphis Press-Scimitar, another Memphis, Tennessee newspaper, seek a review by means of a certiorari proceeding to this Court of a judgment of the Supreme Court of Tennessee, entered against them January 20, 1969, in the case of State of Tennessee v. James Earl Ray, alias Eric Starvo Galt, alias John Willard, alias Harvey Lohmeyer. This opinion is unpublished. It, along with the opinion and judgment of the trial court (one of the criminal courts of Tennessee sitting Shelby County) are in the appendix to the petition.

OPINIONS BELOW.

Petitioners were found in contempt of an order of the Criminal Court of Shelby County, Tennessee, designed for the purpose of prohibiting, among other things, press releases which would tend to prevent the defendant James Earl Ray from receiving a fair trial in a criminal proceeding pending against him in Shelby County, Tennessee, for the murder of Martin Luther King, Jr.

The Tennessee Court of Criminal Appeals refused to review the order of the Criminal Court upon the theory that a review was premature and the Supreme Court of Tennessee merely denied a writ of certiorari to the Court of Criminal Appeals for a review of that court's opinion and judgment. Thus, the matter for consideration by this court is, in effect, the validity of the trial court's order since the Tennessee Appellate courts refused to review it.

JURISDICTION.

Jurisdiction of this Court is invoked by authority of 28 U. S. C., § 1257 (3). Counsel for the State of Tennessee admits the jurisdiction of this court to review the opinion of the State Supreme Court.

QUESTIONS PRESENTED.

Counsel for the petitioners insists that the record in this case presents four questions for this Court to consider. These questions as restated by counsel for the State of Tennessee are as follows:

(1) Whether or not the trial court could enjoin members of the press from the publication of news and punishment for contempt and refusal to obey the injunction

especially since the members of the press were not named in the injunction.

(2) Whether or not the trial judge's refusal to adjudge punishment pursuant to a judgment of contempt violated petitioners' right to a speedy trial in this case.

Counsel for the respondent, State of Tennessee, submits that the foregoing propositions of law are questions raised by the record but denies they are of sufficient importance and magnitude to warrant the attention of this court, but if decided by this court the first should be resolved in the affirmative and the second should be resolved negatively. The reasons given by counsel for the petitioners and justification for this court's issuing the writ of certiorari will be refuted later in this reply in a discussion of the questions presented.

COUNTER-STATEMENT OF THE CASE.

The judge of the trial court, perceiving that the trial of James Earl Ray for the murder of the late Martin Luther King, Jr., was one of great interest nationwide, took early measures to control publicity regarding it so that a fair trial might be held by the issuance of a series of orders designed for that purpose.

The first order entered by the trial court, July 18, 1968, apparently shortly after the arrest of James Earl Ray and his return to Memphis to be held for trial (Tr. 6-9). A committee of eight (8) members of the Shelby County Bar was appointed to serve the court as amicus curiae to help or advise the court relative to the control of publicity in the case. This committee reported to the court prior to July 30, 1968, that there was probable cause to believe that the court's order of July 18 as amended July 23, 1968, had been violated but the court

held on that day (July 30, 1968): "in the interest of preserving the constitutional rights of all concerned and protecting the orderly preparation in progress of the trial, preserves further inquiry and disposition of each and all of the above instances until a later date", and then because the court desired to avoid any possible misunderstanding of its orders, supplemented its previous orders as follows:

> "All lawyers participating in this case, their assistants, associates, staff members, investigators and employees under their supervision and control, County Medical Examiner, Jury Commissioners, Criminal Court Clerk, County Sheriff, Police officials, and other law enforcement officers, employees of this Court, and all other persons employed in the Criminal Courts Building, their associates, deputies, assistants, staff members, and personnel under their supervision and control, are forbidden to take part in interviews or press conferences for publicity, and are enjoined from making extra-judicial statements about this case which involves:
>
> . . .
>
> 5. The credibility of or information concerning any known or intended witnesses or the treatment, acts and attitude of the defendant, and are further enjoined from making any and all other statements which may be prejudicial to a fair trial by an impartial jury in this case whether specified herein or not.
>
> All persons or entity subject to this order who feel aggrieved by anything herein contained are hereby admonished that any such grievances or complaints should be judicially presented.
>
> . . ."

(Tr. 13-15)

A copy of this order was receipted for to the Clerk of the Court by both petitioners for their respective newspapers. In addition to this, a copy of the order was mailed to each of the newspapers and it was published by them (Tr. 16-19 and 26-36). Further, petitioner Edmundson in his testimony, admitted reading the order (Tr. 200). The other petitioner, Hamilton, did not testify in the cause.

The article written by the petitioner Edmundson was found by the court to be in violation of the court's order and is found at pp. 23a-24a Appendix. For the convenience of the court it is quoted below:

"RAY SECURITY CALLED DANGER TO HIS 'SANITY.'

By Charles Edmundson.

The health of James Earl Ray, charged with slaying Dr. Martin Luther King, Jr., is so threatened by security measures in force at the Shelby County Jail that he may not be able to stand trial as scheduled Nov. 12, a private detective employed by Ray's attorney said last night.

Renfro T. Hays, 40-year-old investigator with offices in the Commerce Title Building, compared some of the conditions in Ray's cell with 'devices used by Communist police agents to destroy the health and balance of their victims.'

Hays spoke of bright lights kept shining night and day, of television cameras constantly monitoring the prisoner and of and (sic) uninterrupted lack of privacy.

Arthur Hanes, Ray's attorney, complained of the same items to Criminal Court Judge W. Preston Battle in a preliminary hearing Friday. Mr. Hanes was instructed to put his complaint in writing. The writ-

ten complaint is expected to be argued at another hearing Wednesday.

Mr. Hays said, his work in interviewing prospective witnesses has been easier since Judge Battle Friday repeated his caution that a court order restricting publicity is not to interfere with the right of witnesses to talk to attorneys for the prosecution or the defense.

Interviewed by telephone in Birmingham, Mr. Hanes said only he will have his motion asking security changes ready Wednesday. In court Friday Mr. Hanes charged the conditions 'constitute cruel and unusual punishment.'

Mr. Hays said he does not think the conditions criticized in Ray's cell result from intentional persecution.

'I don't for a moment think Sheriff Bill Morris is trying to drive this guy out of his mind. But it's the effect of this type of surveillance that counts.' ''

The article written by petitioner Hamilton found to be in violation of the court's order is found at pp. 25a-26a Appendix and the pertinent part of the article is as follows:

''In the earlier report, Hanes, Sr. was quoted as saying that Ray has undergone 'enough to bug anybody' during his confinement. He said Ray has had two guards 'breathing down his neck 24 hours a day' and sometimes has to cover his eyes against the bright lights 'shining on him night and day' in order to sleep.

Hanes charged that the security setup surrounding Ray constitutes 'cruel and inhuman treatment.' ''

As indicated above, the trial judge found both reporters to have violated the court's order to limit publicity about the case that would prejudice defendant's right to

a fair trial. He withheld punishment because he stated, "I am not yet ready to decide what final disposition should be made of the matter. It might well be that future action and conduct of all or some of these respondents might be considered as a mitigation or even as a purgation of the offense" (App. 13a). And further at page 15a of the Appendix the court said: "The Court being undecided at this time as to what action the court should take by way of punishment on account of said contempts, and being desirous of giving the matter further consideration, . . . and the same is hereby, reserved by this Court for further and future orders of this Court."

ARGUMENT.

Regulation of Press.

Because of the publication of the two newspaper articles in question, it would seem beyond doubt that it would be read by prospective jurors since the two papers carrying the articles are published daily in the area from which the jurors are required by law to be selected and it would appear to be clear to everyone that the reading of the articles would tend to influence any person who read them.

The article written by petitioner Edmundson at least suggests that the defendant in the criminal proceeding might be mentally incompetent to stand trial on November 12 because if the security measures enforced as to him at the Shelby County jail. It even compared some of the security measures with devices used by Communist police agencies to destroy the health and balance of their victims.

Such language certainly would be a big factor to consider relative to the admissibility of any confession or statement, if any, made by the defendant prior to trial. As a matter of fact it might be the sort of thing that would cause the defendant to make a statement as indicated by **Miranda v. Arizona**, 86 Tenn. 1602, 384 U. S. 436, 16 L. Ed. 2d 694. It would also tend to gain sympathy for the defendant and further it would also affect the weight to be given to defendant's testimony if he decided to testify during the criminal proceeding. The statement made by petitioner Hamilton is to the effect that the treatment undergone by Ray was sufficient to "bug anybody". This statement, it is insisted, would have the same harmful effect towards a fair trial as the statement by petitioner Edmundson.

Bridges v. California, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192; **Pennekamp v. Florida**, 328 U. S. 331, 66 S. Ct.

1029, 90 L. Ed. 1295 and **Craig v. Harney,** 331 U. S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546, relied upon by petitioners are not applicable in this case because in each of them the proceeding to be held was by the judge of the court without the aid of a jury and there resulted no threat to the administration of justice.

The question raised by counsel for the petitioners about the authority of a trial judge to enjoin members of the press for the publication of news and punishment for contempt to obey the injunction. One of the reasons given for granting the writ of certiorari is that this Court has never permitted the press to be criminally prosecuted for publishing an accurate account for newspaper information which had been voluntarily submitted to it. The obvious answer to that position is, of course, if such a question had been decided by this court and certainly would be no reason for granting the writ of certiorari because the question would have already been decided.

The trial judge's action in this respect is bottomed upon statements made by this court in **Sheppard v. Maxwell,** 384 U. S. 333, 357-358, 86 S. Ct. 1507-1519, 16 L. Ed. 2d 600. In that case it was said:

> "'The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the

charges of bias now made against the state trial judge."

Of course, that excerpt related to the authority of the trial judge to protect the jury from outside influence after the trial began. Previously in the opinion it was said that it could not be determined defendant Sheppard was denied due process by the trial judge's refusal to take precautions against the influence of pre-trial publicity alone. But these holdings do not suggest that the trial court does not have authority to regulate and control pre-trial publicity which would influence the outcome of the trial. It is made clear in the case that jury verdicts should be induced only by evidence and argument in open court and not by any outside influence whether a private talk or public print. By quoting from Mr. Justice Holmes in **Patterson v. State of Colorado ex rel., Attorney General**, 205 U. S. 454, 462, 27 S. Ct. 556, 558, to say the least the case stands for the proposition that trial judges have authority to pre-censor publicity relative to a pending trial whether the publicity be during a trial or prior to trial.

Another excerpt from the **Sheppard** case perhaps written in stronger language than the one cited above at pp. 361-364, Vol. 384, U. S. Reports, and pp. 1521-1522, Vol. 86, Supreme Court Reports, is as follows:

"More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See State v. Van Duyne, 43 N. J. 369, 389, 204 A. 2d 841, 852 (1964), in which the court interpreted Canon

20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements."

Finally, this court in the **Sheppard** case said:

> "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."
>
> U. S. Rpt. 363, S. Ct. Rpt. 1522.

Another facet of the first question is that the petitioners could not be guilty of violating the court's order or injunction because they were not parties to it although it is not denied that they did not know of it and the record clearly supports the finding of the trial judge that they did, in fact, know of the court's orders. Cases relied upon by petitioners for this proposition are **Regal Knitwear Company v. N. L. R. B.**, 324 U. S. 9, 65 S. Ct. 478, 89 L. Ed. 661, and **Lanzetta v. New Jersey**, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888. Counsel for the respondent, State of Tennessee, submits that the latter of these cases does not deal with the question under consideration and that the first of these two cases (Regal Knitwear Co. v. N. L. R. B.) strongly supports the position of the respondent as well as the **Sheppard** case as indicated by the last excerpt quoted from that case. In the **Regal Knitwear Co.** case it was said:

> "The Federal Rules of Civil Procedure provide that: 'Every order granting an injunction and every restraining order * * * is binding only upon the parties to the action, their officers, agents, servants, em-

ployees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.' This is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding."

324 U. S. 14-15, 65 S. Ct. 481.

A similar rule prevails in the State of Tennessee as indicated by **Nashville Corp. v. United States Steel Workers of America, et al.**, 187 Tenn. 444, 452-453.

Speedy Trial.

It is insisted that the failure of the trial judge to adjudge punishment in this cause amounts to a denial of a speedy trial to the petitioners as guaranteed by the Sixth Amendment, United States Constitution. **Klopfer v. State of North Carolina**, 386 U. S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1, is relied upon for this position. The present case is considerably different from the **Klopfer** case in that there has already been a judgment of conviction denouncing the conduct of the petitioners and the only thing left to be done is that of imposing punishment when the trial judge becomes satisfied regarding the amount of punishment that should be imposed. There has never been any disposition on the part of the trial judge not to complete his judgment in the case as soon as he decided what should be done. In the **Klopfer** case there had been no judicial determination that the defendant's conduct was in violation of the statute and no indication of the time when if ever a proceeding would begin to determine that question.

It is not unusual but the practice for most courts to take under advisement or consideration novel questions rather

than make a determination or hasty judgment from the bench which might or might not coincide with fairness and justice.

The judgment in this case was rendered September 30, 1968, and a motion for a new trial was denied by the trial judge October 22, 1968. An application for Appellate review apparently was constituted immediately for from the record it appears that the matter was before the Tennessee Supreme Court November 8, 1968, a period of only 17 days after it was finally disposed of by the trial court. Counsel for the respondent, State of Tennessee, insists that the trial judge was entitled to more time to crystallize his thinking on the question involved.

At 3 A. L. R. 1004 and 97 A. L. R. 808, it is said generally that it seems to be well settled that it is the duty of the court on a conviction or plea of guilty to impose sentence within a reasonable time and an indefinite postponement of sentence deprives the court of jurisdiction over the prisoner and a subsequent sentencing is void. In **Van Swergingen v. Van Swergingen,** 122 A. 2d, New Jersey 584, it is said that deferring sentence by a trial judge after a conviction of contempt for a period of 21 days was not unreasonable under the rules of criminal practice in the state of New Jersey requiring that sentences imposed in criminal contempt convictions be done without delay.

Petitioners contend that their inability to have their rights determined in this instance by an Appellate court has a chilling effect upon their right to free speech. They predicate this contention upon the theory that until such a determination is made they do not know the extent of their rights. This may be true but courts exist primarily for the purpose of adjudicating or passing judgment upon the conduct of persons and not to inform them of their rights. Informing people of their rights is only a secondary objective to be derived from court decisions. Very

few courts have jurisdiction to render opinions merely for the sake of advising people of their rights in the abstract. In declaratory judgment suits there must be a live controversy.

Further, the purpose of the order of the court was not only to chill the efforts of the petitioners in the publication of matters or information which would tend to prevent defendant Ray in the criminal suit pending against him from obtaining a fair trial but the purpose of the order was to prohibit such conduct and if the trial judge was right as insisted by counsel for the respondent, State of Tennessee, the delay in imposing sentence or in the petitioners having their rights finally adjudicated would be of no consequence since they would not have the rights prohibited by the trial court's orders.

CONCLUSION.

In view of the foregoing, it is insisted that the trial court was correct in holding that the articles written by the petitioners constituted great and present danger to the holding of a fair trial insofar as defendant Ray was concerned and that the trial court's failure to make an immediate decision with respect to the punishment that should be meted out against the petitioners did not constitute denying them a speedy trial.

Respectfully submitted,

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THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,
Attorneys for Respondent.

Certificate of Service.

I certify that a copy of the foregoing Reply to Petition for Writ of Certiorari for the State of Tennessee has been forwarded to the Honorable Armistead F. Clay, 2700 Sterick Building, Memphis, Tennessee, attorney for petitioners, this the 21 day of March, 1969.

Thomas E. Fox,
Deputy Attorney General.